THE HIGH COURT OF SWAZILAND

ROBERT M. MNGOMEZULU

Applicant

And

ROSTER SHONGWE

1st Respondent

MTHUNZI MNGOMEZULU

2nd Respondent

MAZWI MNGOMEZULU

3rd Respondent

ALFA MSUTHU

4th Respondent

VUMA MNGOMEZULU

5th Respondent

GCINUMUZI MNGOMEZULU

6th Respondent

MDUMO FARMERS LTD

7th Respondent

SWAZILAND DEVELOPMENT AND SAVINGS BANK

8th Respondent

Civil Case No. 1914/2004

Coram: S.D. MAPHALALA-J

For Ihe Plainliff: MR. T. MLANGENI

For the Defendant: MR. D. MAZIBUKO

JUDGMENT

(03/02/2005)

[I] This matter has earned itself a very chequered history within a very short space of time. It came under a certificate of urgency on the 5th July 2004, before Shabangu AJ who postponed it to the 8th July 2004, and ordered the Respondents to file opposing papers by the 7th July 2004. Thereafter it appeared before the same Judge on the 8th July 2004, the 9th July 2004. Thereafter it was postponed before different Judges until it appeared before me on a number of occasions.

[2]The application is for relief in the following terms:

1. That the normal rules of court as to notice, time limits and procedure be and are hereby dispensed with and the matter heard as an urgent one;

2. That the Respondents be and are hereby restrained and interdicted from interfering with the business operations of the 7th Respondent in whatever manner.

3. That the Applicant be and is hereby authorised to exercise all powers of management over the business affairs of the 7th Respondent

and to carry out all duties that are vested in a director of a company by the Common law and/or the Articles of Memorandum of Association of the 7th Respondent and/or the Companies Act of 1912, including signature of cheques and any other documents or instruments that are required for purposes of carrying on the business operations of the 7th Respondent.

4. That the 8th Respondent be and is hereby directed and authorized to allow the Applicant to exercise the powers and carry out the duties referred to in (3) above.

5. That prayers 2, 3, and 4 above are to operate with immediate and interim effect pending institution and finalisation of procedures in terms of the Companies Act of 1912 and/or the Articles and Memorandum of Association to resolve the disputes that have created deadlock among the shareholders and paralysed the business operations of the 7' Respondent.

That the procedures referred to above be instituted within a period of fourteen (14) days from date of this date.

7. That the Applicant is to file a report on progress with this court within a period of three (3) months or such other period as the court may deem fit.

8. Granting costs of suit against the Respondents, except the 8', in the event of their opposing this application.

9. Granting further and/or alternative relief.

[3] The Founding affidavit of the Applicant reveals that all the parties are related to each other in that they incorporated the 7th Respondent as a family company whose main object being sugar cane farming at Siphofaneni in the Lubombo Region. The share capital of the company is E10, 000-00 divided into 10, 000 shares of El each. The Applicant holds 94 shares and his son Mazwi Mngomezulu (3 rd Respondent) one (1) share; the 4th Respondent Alfa Msuthu one (1) share; the 2nd Respondent Mthunzi Mngomezulu one (1) share; 1st Respondent Roster Shongwe one (1) share and the 6th Respondent Gcinumuzi Mngomzulu also holds one (1) share.

[4] In furtherance of the company's objects a loan of E451, 311-00 was obtained from the 8th Respondent and the company embarked on sugar cane farming in 2002. The first harvest was in 2003 realizing gross income of

about El53, 000-00 all the shareholders are also directors of the company, a position as it is averred by the Applicant at paragraph 16 of his affidavit, now appears to be the main recipe for the state of conflict in the company. The Founding affidavit of the Applicant records numerous incidence of discord amongst the shareholders such that there is now a deadlock in the company's activities, thus the present application to restore the status quo ante. In this regard the Applicant has averred in paragraph 35 thereof as follows:

"I submit that my application satisfies the requirements of an interdict in that:

3.5.1 As a shareholder I have a clear right in the well being of the company. In this case I am an overwhelming majority shareholder with 96 shares to 6 shares of the other shareholders together.

3.5.2 The conduct of the minority shareholders infringes my rights, and the infringement is of a continuous nature;

3.5.3 There is no other satisfactory remedy;

3.5.4 The balance of convenience favours the relief that I seek …"

[5] The Respondents have filed a Notice to raise points of law dated the 7th July 2004, and also the Answering affidavit of the 3rd Respondent of even date. The other Respondents also filed shorter affidavits in answer to the Founding affidavit confirming in the main what is contained in the Answering affidavit of the 3rd Respondent. The points of law are the subject matter of this judgment.

[6] The points of law are formulated in the following language:

" 1. The Honourable Court has no jurisdiction to restrain lawfully appointed directors of a company from carrying on the lawful business of their company.

2. The Honourable Court has no jurisdiction to appoint the Applicant the sole Manager and sole director of a company with absolute power to sign cheques and other documents or instruments of that company.

3. The application before court has material disputes of fact which cannot be resolved on affidavits. The Applicant should approach the

court by way of summons".

[7] It appears from the court record that the third point of law concerning disputes of facts has been conceded by the Applicant when Matsebula J on the 15 th October 2004, referred the matter to Registrar to set a date for oral evidence to be led. The issue therefore which vexes the court presently is that of jurisdiction as it appears in point 1 and 2 cited above.

[8] Mr. Mazibuko who appears for the Respondents in addressing the issue of jurisdiction filed Heads of Arguments. He directed the Court to various clauses in the company's Memorandum and Articles of Association which prohibits the court from restraining and interdicting the Respondents as company directors from exercising their rights and duties as directors. The relevant clauses are 52, 53, 54, 56, 61, 67, 69 and 70 of the Memorandum of Association. To further buttress his arguments he cited the authorities of H.S. Cilliers et al, Corporate Law, 2nd Edition at page 134 and that of the English author L.C.B. Gower, Modern Company Law, Edition at page 445.

[9] Mr. Mlangeni who appears for the Applicant advanced au contraire arguments the thrust of which was that the court can exercise its inherent jurisdiction in a situation like in the present case where there is a deadlock in the operations of a company. In this regard I quizzed Mr. Mlangeni in the course of his arguments as to whether he had in mind judicial management as provided for by the Companies Act or Section 112 (a) of the same Act which deals with the principle of "just and equitable". In the latter instance a shareholder of a company can petition for the winding up of the company under the said Section where there has been a "deadlock" amongst the shareholders under the "just and equitable" principle provided by the said Section. It would appear to me that in these two instances the shareholder concerned has to invoke the provisions of the Act unlike in the present case where the court is asked to exercise its inherent jurisdiction to preserve the status quo ante in the face of a continuing wrong/s by the other shareholders and the fact that the liquidation of the company per se is not being

sought.

[10] According to the author C.B. Prest, The Law's Practice of Interdicts, (1996) (Juta) at page 294 the power and competence of a court, even a superior court, is not unlimited, and the general fundamental principle of inherent jurisdiction is subject to particular derogation.

[11] The general principle is that the jurisdiction of a court may be taken away by statute even though it is not taken away in express terms, if the court, after considering the whole statute, is of the opinion that such was the intention of the legislature, (see also folio 187 in C.B. Prest (supra).

[12] It would appear to me that on the facts of the present case and perusal of the Companies Act as cited by Counsel for the Respondents and further on the authority of C.B. Prest (supra) cited immediately above that the jurisdiction of this court has been curtailed by the said statute. It appears further to me that the Applicant's remedies would lie either on Section 112 of the said Act or the procedure laid down by the said Act for judicial management of a company in dire straits, as in the present case. The former procedure applies when there is a "deadlock" in the management of a company and the court would apply what is generally known as the "just and equitable" principle (see Moosa, NO vs Mavjee Bhawan (Pty) Ltd and another 1967

(3) S.A. 131 (T) at 137,138 and that of Hart vs Pinetown Drive in Cinema 1972 (1) S.A. 464 D and Willie and Millin, Merchantile Law of South Africa (15 Ed) at page 654).

[13] For the afore-going reasons therefore, I find that the Applicant has not proved his case for the relief sought and as a result the application stands to be dismissed. Costs to follow the event.

S.B. MAPHALALA

JUDGE